

Message

From: Maher, Lauren [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B31491F235ED4F42B8993457B426F4FE-MAHER, LAUR]
Sent: 4/10/2018 12:29:27 PM
To: Schroer, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=573fc5bb4942495d9fc3cd9438634244-LSCHROER]; Neugeboren, Steven [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfd837ac503949a9820715b53ba921e6-SNEUGEBO]
CC: Marshall, Tom [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5d29134e5e32489b9ab0aeb262f55075-TMARSHAL]
Subject: WA/ID references to Maine Letter
Attachments: Response to comments.pdf; Final WA Rule- FR.pdf

Hi Lee and Steve,

As background for our meeting with David, we referenced the Maine letter in a footnote in our Washington final rule (attached, and pasted immediately below) as well as in our response to comments document on the Washington proposed rule (attached, and pasted in Leah's email below).

Footnote in WA Rule re: DOI Letter (pg 85,423):

"While EPA's action is based on harmonizing the requirements of the CWA with the terms of the treaty-reserved subsistence fishing right, the action also is consistent with federal Indian law principles addressing subsidiary treaty rights. A written legal opinion from the Solicitor of the U.S. Department of Interior (DOI) to EPA analyzed whether tribal reserved fishing rights include subsidiary rights to sufficient water quality. Letter from Hilary C. Tompkins, Solicitor, DOI, to Avi Garbow, General Counsel, EPA, regarding Maine's WQS and Tribal Fishing Rights of Maine Tribes (January 30, 2015). Although DOI's legal opinion primarily involved an analysis of fishing rights of tribes in Maine in connection with EPA's February 2, 2015 decision to disapprove WQS applied to waters of Indian Lands in Maine, its discussion of tribal fishing rights and water quality has relevance to tribes with reserved fishing rights in Washington. DOI's legal opinion identified several court decisions, including Supreme Court decisions interpreting the reserved fishing right in the Stevens Treaties, which have held that fishing rights for tribes encompass subsidiary rights that are necessary to render those rights meaningful."

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From: Brown, Leah
Sent: Friday, April 6, 2018 2:50 PM
To: Maher, Lauren <Maher.Lauren@epa.gov>
Subject: Mentions of DOI Opinion

Hi Lauren,

Matt reminded me that we reference the 2015 DOI Opinion in the response to comments on the WA federal rule document. Our discussion is as follows:

EPA's understanding, moreover, has received recent support from the Office of the Solicitor in the Department of Interior, which considered the relationship between tribal fishing rights and WQS in Maine and confirmed to EPA that tribal fishing rights "should be taken into account when evaluating the adequacy of [a state's] WQS." Although the Solicitor's analysis involved the particular legal sources of Maine tribes' fishing rights, it drew on broadly applicable tenets of federal Indian law, including principles articulated by the courts in cases interpreting tribal fishing rights in Washington. As the Solicitor stated:

In summary, fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right. Case law supports the view that water quality cannot be impaired to the point that fish have trouble reproducing without violating a tribal fishing right; similarly water quality cannot be diminished to the point that consuming fish threatens human health without violating a tribal fishing right. A tribal right to fish depends on a subsidiary right to fish populations safe for human consumption. If third parties are free to directly and significantly pollute the waters and contaminate available fish, thereby making them inedible or edible only in small quantities, the right to fish is rendered meaningless. To satisfy a tribal fishing right to continue culturally important fishing practices, fish cannot be too contaminated for consumption at sustenance levels.

EPA's recognition that the adequacy of WQS under the CWA must be considered in light of the need "to effectuate" tribes' legally protected fishing rights, and that criteria designed to protect Washington's fish and shellfish designated harvesting uses must be "harmonize[d]" with "these reserved rights, including treaty rights," corrects a frequent misunderstanding among some states and commentators about the import of tribes' legally protected rights.

Ex. 5 Attorney Client (AC)

There are also several references to the Maine action in the RTC document.

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Let's chat.

Lisa confirmed that we didn't reference the DOI opinion in any of our comment letters to Idaho.

Thanks,

Leah
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